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Supreme Court, U.S.
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No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

LEEANDER JEROME BLAKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On September 19, 2002, a murder occurred on Cumberland Court in the historic district of Annapolis, Maryland. (App. 4a). On October 25, 2002, Terrence Tolbert was arrested in connection with the murder. (App. 4a). On the following day, October 26, 2002, at approximately 5:00 a.m., Mr. Blake was arrested at his home at gunpoint. (App. 4a). Mr. Blake, a seventeen year old, was removed from his home wearing underwear and no shoes. (App. 4a). Mr. Blake was transported to the Annapolis Police Department and Detective William Johns advised Mr. Blake of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) at 5:11 a.m. (App. 4a). Mr. Blake indicated that he did not want to talk to the police without an attorney. (App. 4a). Mr. Blake was then placed in a holding cell. (App. 4a).

At 6:00 a.m., Detective Johns went to Mr. Blake's cell accompanied by Officer Curtis Reese. (App. 4a). Detective Johns handed Mr. Blake a copy of his arrest warrant and told him to read the document carefully. The Statement of Charges improperly and incorrectly read in *large print* and *capital letters* that Mr. Blake, a juvenile, faced the *death penalty*. (App. 5a). As Detective Johns turned to leave, Officer Curtis Reese, who had accompanied Detective Johns to Mr. Blake's cell, stated in a loud and confrontational tone, "I bet you want to talk now, huh?" (App. 5a). Detective Johns stated, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now" and pushed Officer Reese out of the cell block. (App. 6a). Detective Johns testified that he was upset, angry and was afraid Officer Reese had violated Mr. Blake's right to counsel. (App. 6a).

Approximately twenty-eight minutes later, after clothing for Mr. Blake arrived at the police department, Detective Johns returned to the holding cell to give Mr. Blake the clothes. (App. 6a). As Detective Johns was about to leave the cell, Mr. Blake said, "I can still talk to you?" (App. 6a). Detective Johns asked Mr. Blake whether he was saying he wanted to talk to Detective Johns and Mr. Blake responded, "Yes." (App. 6a). Mr. Blake was then returned to the interview room, read his rights again and agreed to provide a statement without an attorney. (App. 6a).

Mr. Blake testified that the police officers arrived at his home at 4:30 a.m. while Mr. Blake was watching cartoons. (App. 7a). He was arrested, handcuffed, and taken in his underwear and taken to the police station. (App. 7a) At the police station, after he was advised of his rights, Mr. Blake asked for a lawyer. (App. 7a). He was then placed in a cell and nothing more was said to him until Detective Johns and Officer Reese brought him his charging documents. (App. 7a). At that time, Officer Reese said, "I bet you want to talk now, huh!" (App. 7a). When Mr. Blake was questioned about what caused him to agree to talk to Detective Johns after he had earlier stated he did not want to speak with him, Mr. Blake stated, "first, it was what Officer Reese said to me, 'I bet you want to talk now, huh!' I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death." (App. 7a-8a).

The following factual findings were made by the suppression court:

> Next question, did Blake invoke his right to counsel? The answer is yes. He requested the presence of an attorney before any questioning could occur.

He signed an advice of rights form at 05:11 hours. At this point, *Miranda* and *Edwards* require that the Defendant be afforded an attorney before any interrogation by the police. (App. 9a).

The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind. (App. 8a).

At approximately 6:00am, Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell. As in *Edwards*, Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it." (App. 8a).

As Johns turned to walk out, Reese said in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this. (App. 9a).

He also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the

death penalty. This was done intentionally or by mistake . . . No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action. (App. 9a).

So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes. (App. 9a).

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement. (App. 9a).

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a 17 year old, indicating to him for the first time that he is being charged with murder and he can get the death penalty. (App. 9a-10a).

Reese's statement was, "I'll bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscious like the remarks were in *Brewer versus Williams*. First, the statement itself suggests he should want to talk. And the word, "now," that is, "I'll bet you want to talk now" clearly refers the Defendant to what has just been handed to him. (App. 10a).

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is in direct response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement. So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since 28 minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed. (App. 10a).

Is there any possible interpretation of that statement that it is, as the State has urged to the Court to find, simply an innocent offhand comment not meant or expected to elicit an incriminating response? I don't think so. Examples of innocent offhand comments not likely to elicit an incriminating response would be "Here are some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water?" (App. 10a-11a).

United States versus Walker instructs courts to look at the context in which the statement is made. Once again, the context is the statement was made to a 17 year old with no Miranda or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death . . . This statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a 17 year old. (App. 11a).

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State police barracks. She signed a consent form but never saw or spoke to the Defendant. We now have change of location and the re-Mirandizing of the Defendant. (App. 12a).

However, this is all one continuous course of conduct beginning with Officer Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. **It is unlikely that an honest 17 year old who is respectful of authority would realize he could turn back now.** (Emphasis added) (App. 12a).

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, when viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel. (Emphasis added) (App. 12a).

He was thereafter interrogated by police in violation of Miranda and Edwards. **The State must prove his subsequent pro forma waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden.** (Emphasis added) (App. 12a).

The Maryland Court of Appeals addressed the Petitioner's writ of certiorari to answer the following question: "Did the police actions in question constitute the functional equivalent of interrogation?" The Maryland Court of Appeals answered that question in the affirmative.

REASONS FOR DENYING THE PETITION

Although the Petitioner has now conceded that Officer Reese's comment was interrogation, the Petitioner now suggests this Honorable Court should address what the Petitioner claims is an entirely different question: When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards v. Arizona*, 451 U.S. 477 (1981), permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police? However, a review of the record will demonstrate that the Maryland Court of Appeals squarely addressed this argument, found that a violation can be cured, and then rejected the Petitioner's argument. The Maryland Court of Appeals stated, in pertinent part:

> We agree with Judge North that petitioner did not initiate further contact with the police and the police violated the *Edwards* rule. Although petitioner's question to Detective Johns, "I can still talk to you?" might be considered an "initiation" in the dictionary sense of the word as used in Bradshaw, it could hardly be said that, **under the circumstances**, petitioner initiated contact in the legal sense. Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. (Emphasis added) (App. 26a).

There was no break in custody or adequate lapse of time sufficient to vitiate the coercive effect of the impermissive interrogation. *See Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (holding that break in custody after invocation of Fifth Amendment rights ends the need for the Edwards rule); *United States v. Walker*, 624 F.Supp. 103, 105 (D.Md. 1985) (holding that following defendant's invocation of his Miranda rights, delay of approximately one hour not sufficient to constitute waiver of right to have counsel present before he made any statement. (Emphasis added) (App. 26a).

We reject the State's argument that, even if Officer Reese, interrogated petitioner in violation of *Miranda* and *Edwards*, Detective Johns somehow cured the violation by declaring in a loud voice: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Judge North's conclusion that Detective Johns' remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous. (Emphasis added) (App. 26a-27a).

The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former. (App. 27a).

The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive interrogation. **Under these circumstances**, we conclude that petitioner did not "initiate" conversation with the police. (Emphasis added) (App. 27a).

I. This Honorable Court's Rule in *Edwards* is Clear.

The Petitioner contends that the Maryland Court applied a "narrow, straightjacket" approach which the Petitioner suggests is somehow "draconian." (Petitioner's Brief pp. 6-7) There is simply no reason, as the Petitioner argues, for this Honorable Court to re-examine *Edwards* and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) to "offer a pragmatic, yet effective prophylactic rule in assessing an alleged *Edwards* violation." (Petitioner's Brief pp. 7-8.) The Maryland Court correctly followed existing case law and made its decision based on the specific factual circumstances present in this case. The Maryland Court did not hold that *Edwards* never permits intervening circumstances to cure a violation of one's right to counsel, but instead held that "**under these circumstances**," there were no intervening circumstances that cured the violation of Mr. Blake's right to counsel before the later interrogation.

The Petitioner argues that a number of factors should have led the Maryland Court to hold that Mr. Blake's initiation of contact was not tainted: Detective Johns properly administered Miranda warnings to Mr. Blake; ceased questioning when Mr. Blake requested an attorney; provided Mr. Blake with a copy of the statement of charges; Mr. Blake said nothing after Officer Reese's comment, Detective Johns shut down any possible conversation; Mr. Blake learned from

the statement of charges that Tolbert was placing the blame on him; Mr. Blake asked to talk to Detective Johns thirty minutes later and Mr. Blake was re-advised of his Miranda warnings. What the Petitioner omits is that it was not just Officer Reese's comment, but the entire set of circumstances, that led the suppression court and Maryland Court of Appeals to rule that the subsequent statement was tainted. In addition to Officer Reese's comment, Mr. Blake was shown a statement of charges which improperly informed him that he was facing the death penalty. Mr. Blake was cold and scared. It was these circumstances, coupled with the fact that only thirty minutes prior, Officer Reese improperly interrogated Mr. Blake that led to the Maryland Court's finding. As the Court of Appeals held, the suppression court's factual findings were not erroneous and should not be disturbed. Based on those factual findings and the application of existing law, the Maryland Court's decision was correct.

II. The *Seibert* Analysis is Unavailing to the Petitioner's Argument.

The Petitioner argues that if this Honorable Court took an approach similar to the one taken in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), the result in Mr. Blake's case would be different. That is not the case.[1] The Petitioner states, "even assuming an impermissible remark by Officer Reese, one must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect . . . It certainly cannot be the case that Officer Reese's comment forever taints a subsequent waiver." (Petitioner's Brief p. 14).

1. Additionally, in *Seibert*, the Supreme Court considered Miranda warnings which is a court created prophylactic rule. In the case at bar, what was at issue was Mr. Blake's constitutionally guaranteed right to counsel.

Mr. Blake agrees that it is NOT the case that Officer Reese's comment forever taints a subsequent waiver. The Maryland Court did not make such a finding. The Maryland Court properly considered Detective Johns alleged curative measures and rejected that argument as did the suppression court. The suppression court had the opportunity to evaluate the witnesses and assess their demeanor. The suppression court was convinced that Mr. Blake was still laboring under the influences of Officer Reese's comments and that based on the **totality of the circumstances**, Mr. Blake's right to counsel was violated. Those factual findings were not erroneous nor was the legal finding by the Maryland Court of Appeals.

III. There is No Inconsistency in the Lower Courts that Warrant Granting the Petitioner's Writ.

The Petitioner also argues that there is an inconsistency among the lower courts in analyzing *Edwards*, citing *State v. Plch*, 826 A.2d 534 (N.H.), *cert. denied*, 124 S. Ct. 546 (2003).

An examination of the *Plch* case demonstrates that the Maryland Court used the same approach but reached a different factual conclusion based on the circumstances in Mr. Blake's case which is the purpose of a state court. The *Plch* court specifically noted that approximately two and a half hours after the improper comments, the defendant (an adult) gave an incriminating statement. The *Plch* court stated, "Given the significant time lapse and the defendant's continued denials, we conclude that the defendant's initiation of dialogue with the police was not prompted by Lieutenant Putney's improper comments." *Id.* at 542. On the other hand, the Maryland Court noted:

> The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient

> to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former. (App. 27a).
>
> The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive interrogation. **Under these circumstances,** we conclude that petitioner did not "initiate" conversation with the police. (Emphasis added) (App. 27a).

What the Petitioner is really suggesting is that because it prefers the result in *Plch* over the result of the Maryland Court, this Honorable Court should grant certiorari in this case. Even if there is an inconsistency among the lower courts, the Maryland courts have applied the *Elstad*-type analysis, articulated in *Oregon v. Elstad*, 470 U.S. 298 (1985), advocated by the Petitioner and properly rejected the Petitioner's argument.

IV. Public Policy Concerns Do Not Require this Honorable Court to Grant Certiorari.

Finally, the Petitioner argues that public policy concerns require that this Honorable Court grant certiorari. The Petitioner classifies Officer Reese's remark as "offhand" and states that the Constitution was not designed to "set the guilty free." (Petitioner's Brief p. 19). First, there is no evidence that Officer Reese's remark was "offhand." In fact, the suppression court specifically noted that Officer Reese's remark was intended to elicit an incriminating response. (App. 9a). The Petitioner also makes reference to the fact that by ordering suppression of the statement, the trial court has "under state law, allowed Blake to

go free." (Petitioner's Brief p. 8). The law to which the Petitioner refers, *Md. Ann. Code, Cts. & Jud. Proc.* § 12-302(c)(3)(iv) (2002) was changed by the Maryland legislature last term.[2] Lastly, there is also no evidence that Mr. Blake is guilty of the crime with which he is charged. The Maryland Court has properly addressed and rejected the Petitioner's arguments presented here.

CONCLUSION

Because the factual finding in this case was not clearly erroneous and that there is no confusion regarding the application of *Edwards*, Mr. Blake respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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2. The 2002 statute provided that if the State appealed the granting of a motion to suppress, a defendant would be released pending the outcome of the appeal. *Md. Ann. Code, Cts. & Jud. Proc.* § 12-302(c)(3)(v)(2)(A) (2004) now provides that if the defendant is charged with a crime of violence, the court may order the defendant remanded to custody pending the outcome of the appeal.